PATTON BOGGS LLP
ATTORNEYS AT LAW

2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

September 28, 2010

Paul C. Besozzi
Direct: 202-457-5292
pbesozzi@pattonboggs.com

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Appeal of USAC Decision On Appeal of Notification of Commitment Adjustment in CC Docket No. 02-6

Applicant Name:	St. Luke School
Billed Entity Number:	10463
Funding Year	2002
Form 471 App. Number:	301724
Funding Request Numbers:	774680, 774693, 774709

Dear Ms. Dortch:

St. Luke School ("St. Luke"), acting through counsel and pursuant to Sections 54.719-54.721 of the Commission's rules[1], hereby timely files this Request for Review ("Appeal"). The Appeal requests Commission review of the adverse decision of the Administrator of the Universal Service Administrative Company ("USAC")[2] denying the funding requests enumerated above for Funding Year 2002 and seeking recovery of previously disbursed E-rate support funds. *See* Exhibit 1 attached hereto.

More specifically, on August 23, 2010, USAC's Schools and Libraries Division ("SLD") issued a decision denying an appeal filed by St. Luke with USAC. In its decision USAC held that St. Luke was responsible for an E-rate program rule violation relating to the Commission's competitive bidding rules. The USAC appeal denial reiterated a previous USAC decision requiring the applicant

[1] 47 C.F.R. §§ 54.719-54.721.

[2] Administrator's Decision on Appeal - Funding Year 2002 – 2003, St. Luke School (Aug. 23, 2010), attached as Exhibit 1.

to return previously disbursed funds made available pursuant to the referenced Funding Request Numbers.

St. Luke is aggrieved by USAC's August 23, 2010, decision and submits that for various reasons outlined in its original appeal to USAC, including the fact that the USAC request to return funds was issued after the FCC-established 5-year administrative period, and others, the latest USAC decision is unwarranted and unjustified under the rules, policies and requirements governing competitive bidding and the E-rate Program that were applicable to the referenced Form 471 Application and Funding Request Numbers.

St. Luke is filing this Appeal well prior to the 60-day appeal period prescribed by the Commission's rules because USAC has been issuing Demand Payment Letters to similarly-situated schools of the Archdiocese requiring payment of the amount sought to be recovered, with such payment due in 30 days (e.g., by September 30, 2010). The undersigned counsel reasonably assumes that USAC has issued similar letters to all similarly-situated schools, even though the period for filing an FCC appeal will not expire until later in October. Further, in the past USAC staff has informed the undersigned counsel that the only way to forestall the further implementation of USAC's collection process was to file an appeal with the Commission, even though there remained significant time before the end of the 60-day appeal deadline.

St. Luke will supplement this Appeal with a full discussion of the facts, St. Luke's position and supporting arguments.

Respectfully submitted,

Paul C. Besozzi
Counsel to the Archdiocese of New York and St. Luke School

Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-5292
pbesozzi@pattonboggs.com

cc: James P. McCabe, Esq.

EXHIBIT 1

Administrator's Decision on Appeal – Funding Year 2002 - 2003

August 23, 2010

Paul C. Besozzi, Esquire
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037-1350

RE:	Applicant Name:	Saint Lukes School
	Billed Entity Number:	10463
	Form 471 Application No.:	301724
	Funding Request Number(s):	774680, 774693, 774709
	Your Correspondence Dated:	November 30, 2008

Dear Mr. Besozzi:

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Commitment Adjustment Letter ("COMAD") to Saint Lukes School and Elite Systems, Inc. ("Elite") for Funding Year 2002 for Application Number 301724. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your Letter of Appeal included more than one Application Number, please note that you will receive a separate letter for each application.

Funding Request Number(s): 774680, 774693, 774709
Decision on Appeal: **Denied**
Explanation:

- On appeal, Saint Lukes School proffers several arguments as to why SLD erred in its decision to issue a COMAD and seek recovery of funds that have been improperly disbursed in Funding Year 2002. First, Saint Lukes School argues that the five-year administrative time limitation for issuing the COMAD has expired and thus, the COMAD must be rescinded. Specifically, Saint Lukes School argues that all services were delivered to Saint Lukes School by June 30, 2003 for Funding Year 2002 services and because the COMAD was dated September 30, 2008, the five-year administrative time limit had expired.

- SLD agrees that the FCC established a five-year administrative time period for completing investigations and audits in the *Schools & Libraries Fifth Report and Order*.[1] The FCC stated

> [W]e will initiate and complete any inquiries to determine whether or not statutory or rule violations exist within a five year period after final delivery of service for a specific funding year . . . Under the policy we adopt today, USAC and the Commission shall carry out any audit or investigation that may lead to discovery of any violation of the statute or rule within five years of the final delivery date of service for a specific funding year. In the E-Rate context, disbursements often occur for a period up to two years beyond the funding year . . . For consistency, our policy for audits and other investigations mirrors the time that beneficiaries are required to retain documents pursuant to the rule adopted in this order. We believe that conducting inquiries within five years strikes an appropriate balance between preserving the Commission's fiduciary duty to protect the fund against waste, fraud, and abuse and the beneficiaries' need for certainty and closure in their E-Rate application process. *Id.* at ¶¶ 32-33.

The Commission further explained that this administrative five-year period was not the same as the five-year time frame established pursuant to the Debt Collection Improvement Act of 1996 ("DCIA"), in that this time frame was the "time period within which we must bring action to establish a debt due to violations of the E-Rate program rules or statutory provisions. In contrast, the DCIA statute limitations relates to the time period within which we must act to collect the debt once established." *Id.* at ¶ 32 n.55.

In the present matter, USAC determined that Elite and Saint Lukes School violated program rules for Funding Year 2002, when it concluded that Elite Systems, Inc. and Jiin Kang (a.k.a. Jiin Artis) improperly prepared and submitted Saint Lukes School's Form 470 for Funding Year 2002. In a June 7, 2006 response, Ms. Kang stated that "To the best of my recollection, in funding year ("FY") 2001 and 2002, I prepared the Form 470 applications for every school on Attachment A, except for Immaculate Conception School in 2001 and Sacred Heart in 2002."[2] USAC's Special Compliance Review ("SCR") team completed its investigation and issued its final report on March 10, 2008, concluding that Saint Lukes School and Elite violated program rules and the funding for Funding Year 2002 must be recovered. The *Fifth Report and Order*, does not require USAC to take actions to recover the improperly disbursed funds within this five-

[1] *In the Matter of Schools and Libraries Universal Support Mechanism*, Fifth Report and Order, CC Docket No. 02-6, 19 FCC Rcd 15808, 15819, at ¶32 (2004) ("*Fifth Report & Order*").
[2] It should be noted that Saint Lukes School was one of the schools listed on Attachment A that Ms. Kang confirmed preparing the Form 470 for Funding Year 2002.

year administrative time period; it only has to conclude that there was a violation of E-Rate program rules and establish that a debt is owed within the time frame.

Further, according to USAC's records, the last date of service for FRN 774693 was June 30, 2003 and the last date of service for FRN 774680 and FRN 774709 was September 30, 2004 (an extension of time for delivery of services was provided for these FRNs). The Commission's *Fifth Report and Order* requires USAC to determine whether program violations occurred and that a debt is owed by June 30, 2008 for FRN 774693 and by September 30, 2009 for FRN 774680 and FRN 774709. As explained above, USAC issued its final SCR report and established that Saint Lukes School and Elite owed a debt due to their program violations on March 10, 2008 (which is within the five-year administrative timeframes for these FRNs). USAC complied with the requirements of the *Fifth Report and Order* and will not rescind the COMAD on this basis.

- Saint Lukes School next argues that USAC failed to provide documents or evidence to substantiate its conclusion that Elite participated in the competitive bidding process of Saint Lukes School for Funding Year 2002. Saint Lukes School asserts that this evidence is required to allow it to file "an informed appeal." (Saint Lukes School Appeal Br. at 5).

- USAC disagrees with the assertion that it did not provide enough evidence or documentation to allow Saint Lukes School to appeal the decision to rescind funding for Funding Year 2002. Counsel is aware of Ms. Kang's June 7, 2006 response to USAC's May 24, 2006 inquiry regarding her role in preparing Form 470s for applicants who selected her services in Funding Year 2002. [3] In that June 6, 2006 response, Ms. Kang confirmed that:

  > I prepared the Form 470 applications for every school on Attachment A,[4] except for the Immaculate Conception School in 2001 and Sacred Heart in 2002. At the time, most of the schools' administrators and staff lacked the technical knowledge and/or Internet access necessary to complete their Form 470s online. At the schools' request, I agreed to complete the online portions of their Form 470s after receiving completed paper copies of the forms from the schools.

  Contrary to Ms. Kang's assertion that "there was no rule or Form 470 instruction in effect at the time that prohibited service providers from assisting schools to file Form 470s," such action was prohibited for applications filed for Funding Year 2002. USAC's training presentation for Funding Year 2002 clearly states that "[s]ervice providers may not fill out program forms for applicants that require

[3] Counsel cited language from this response in its May 21, 2009 response to USAC's April 21, 2009 Letter of Inquiry.

[4] As noted before, Saint Lukes School was one of the schools listed on Attachment A.

certification."[5] The 2001 training materials further state that "[t]he Form 470 must be completed by the entity that will negotiate with prospective bidders." *Id.* at slide 27. As Saint Lukes School is aware, the Form 470 requires its certification, and thus, it may not be prepared by Elite. Also since Saint Lukes School is the party responsible for negotiating with prospective bidders, it is required to complete the Form 470. E-Rate program rules do not include any exceptions that would allow the service provider to prepare and submit the Form 470 on behalf of applicants. Contrary to Saint Lukes School's argument, service providers are not allowed to provide "data entry" services to the applicant related to preparing the FCC Form 470, or any other program form that requires the applicant's certification. As the FCC has held repeatedly, ignorance of program rules is not a defense to program violations.[6] Further, each applicant must take responsibility for understanding the Commission's rules when applying for discounts under the schools and libraries universal service support mechanism.[7]

It should further be noted that applicants were not required to file Form 470s online and were allowed to file paper copies of the Form 470 with USAC for Funding Year 2002. Thus, Ms. Kang's explanation for why she prepared Saint Lukes School's Form 470 for Funding Year 2002 does not excuse the action or the competitive bidding violation. The fact that USAC questioned Ms. Kang about her role and she confirmed that she prepared the Form 470 on behalf of Saint Lukes School is enough evidence for USAC to conclude that Elite and Saint Lukes School violated E-Rate program rules for Funding Year 2002.

- Saint Lukes School next argues that it complied with all aspects of the Commission's competitive bidding rules. (Saint Lukes School Appeal Br. at 6.) Saint Lukes School explains that USAC posted its Form 470 on November 13, 2001. Saint Lukes School confirms that it sought Internet Access, internal connections, and network maintenance services. Saint Lukes School further confirms that it waited 64 days before selecting Elite as the low-cost provider. Saint Lukes School also states that it filed its Form 471 on January 16, 2002. Based upon these actions, Saint Lukes School concludes that it satisfied all of the Commission's competitive bidding rules.

  Saint Lukes School further asserts that the language in its Funding Year 2002 Form 470 was "vendor neutral" and that one service provider did not benefit over

[5] USAC, "Enforcement Review," Train-the-Trainer Workshop, slide 30 (Sept. 17-18, 2001), *available at*, www.usac.org/sl/about/training-sessions/training-2001/2001-presentations.aspx.

[6] *See, e.g., In re Application of Detroit Public Schools*, Mem. Op., File No. BRED-20040512AEL, 21 FCC Rcd 13688, 13691, DA 06-2344, ¶11 (rel. Nov. 27, 2006) ("[T]he Commission has repeatedly declared that ignorance of the law is not a defense or a mitigating circumstance to a violation.") (footnote omitted).

[7] *See In the Matter of Request for Review of the Decision by the Universal Service Administrator by Pearl River School District, Pearl River, New York*, CC Dockets 96-45, 97-21, 17 FCC Rcd 3538, 3542, DA 02-432, ¶ 10 (Feb. 26, 2002) ("[I]t is administratively necessary to place on the applicant the ultimate responsibility of complying with all relevant rules and procedures. An applicant's misunderstanding of program rules provides no basis for deviating from the Commission's policy of placing on the applicant the responsibility for understanding program rules and procedures.") (footnotes omitted).

another. Saint Lukes School argues that because it used vendor neutral language that "[c]learly Elite could not have an unfair advantage or inside information regarding the provision of services described in such a generic manner." (*Id.*)

- USAC does not agree that Saint Lukes School's use of "vender neutral language" cured the competitive bidding violations. Specifically, Saint Lukes School makes no mention here of the fact that Ms. Kang of Elite prepared and submitted Saint Lukes School's Form 470 for Funding Year 2002. As explained above, the fact that Ms. Kang prepared and submitted Saint Lukes School's Form 470 is a clear violation of program rules and the fact that Saint Lukes School might have complied with other FCC competitive bidding rules does not cure this violation.

- Saint Lukes School also asserts that Saint Lukes School "did not abrogate its competitive bid responsibility. Elite did not influence or participate in Saint Lukes School's competitive bid process." (Saint Lukes School Appeal Br. at 7.) Saint Lukes School appears to be arguing that because Saint Lukes School signed and certified its FCC Form 470 and an Elite employee was not listed as a contact person on its Form 470, that it complied with all program rules, including the Commission's directives in *MasterMind*.[8]

- SLD disagrees that Saint Lukes School did not abrogate its competitive bid responsibility. The fact that Saint Lukes School signed and certified its Form 470 and did not list an Elite employee as its contact person does not alter USAC's finding that Ms. Kang prepared and submitted Saint Lukes School's Form 470 for Funding Year 2002 in violation of program rules. In *Caldwell*, the Commission held that a service provider filling out and submitting the applicant's Form 470 was a "clear violation of the prohibition against service providers filling out forms that require an applicant's certification, as well as a violation of the mandate that the FCC Form 470 be completed by the entity that will negotiate with prospective bidders."[9]

  FCC rules require a fair and open competitive bidding process. Under the Commission's rules, service providers may not participate in the bidding process other than as bidders because, as the Commission has ruled, "direct involvement in an application process by a service provider would thwart the competitive bidding process."[10] Communications between applicants and service providers

---

[8] *In the Matter of Request for Review of Decision of the Universal Service Administrator by MasterMind Internet Services, Inc.*, CC Docket No. 96-45, 16 FCC Rcd 4028, FCC 00-167 (2000) ("*MasterMind*").

[9] *In the Matter of Requests for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al.*, Docket No. CC 02-6, 23 FCC Rcd 2784, 2791, ¶ 17(2008) ("*Caldwell*").

[10] *In the Matter of Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, 19 FCC Rcd 6858, ¶ 60 (2003). *See also, MasterMind,* 16 FCC Rcd at, 4032-33, ¶ 10; *Request for Review of the Decision of the Universal Service Administrator by SEND Technologies LLC, Schools & Libraries Universal Service Support Mechanism*, Order, CC Docket No. 02-6, DA 07-1270 (2007); *Request for Review of the*

that unfairly influence the outcome of the competition, provide inside information, or allow the provider to unfairly compete taints the competitive process. USAC guidance provides in relevant part as follows:

> The competitive bidding process must be fair and open. "Fair" means that all bidders are treated the same and that no bidder has advance knowledge of the project information. "Open" means that there are no secrets in the process, such as information shared with one bidder but not with the others, and all bidders know what is required of them.
>
> In order to be sure that a fair and open competition is achieved, any marketing discussions held with service providers must be neutral, so as not to taint the competitive bidding process. That is, the applicant should not have a relationship with the service provider prior to the competitive bidding that would unfairly influence the outcome of a completion or would furnish the service provider with "inside" information or allow it to unfairly compete in any way.[11]

- In the present matter, it is clear that Elite had advance knowledge regarding Saint Lukes School's Form 470 because Ms. Kang prepared and submitted the Form 470 on behalf of Saint Lukes School. It is also clear that Saint Lukes School had a relationship with Elite prior to the competitive bidding process and had furnished Elite with "inside" information by allowing Ms. Kang to prepare and submit its Form 470 on its behalf. The Commission has explicitly stated that "[t]o ensure the competitive bidding process enables schools and libraries to chose the best and most efficient provider of services, applicants should not have a relationship with a service provider prior to the competitive bidding process that would unfairly influence the outcome."[12] As Saint Lukes School is aware, the filing of the Form 470 and posting by USAC initiates the competitive bidding process under FCC rules, and thus, by allowing Elite to prepare and submit its Form 470, it violated the Commission's rules.

- SLD has determined that program rule violations have occurred and as a result this appeal is denied in full. FCC rules require USAC to rescind funding commitments in all or part, and recover funds when USAC learns that funding commitments and/or disbursements of funds were inconsistent with program rules.[13] In particular, FCC

Decision of the Universal Service Administrator by Caldwell Parish School District, et al., Schools & Libraries Universal Service Support Mechanism, Order, CC Docket No. 02-6, DA 08-449 (2008).

[11] *See* www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx.

[12] *In the Matter of Request for Review of a Decision of the Universal Service Administrator by Lazo Technologies, Inc., et al.*, CC Docket No. 02-6, 2009 WL 2477276, at *3, DA 09-1797, ¶ 10 (F.C.C. Aug. 12, 2009).

[13] *See Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket Nos. 96-45, 97-21, FCC 99-291 (1999); *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket Nos. 96-45, 97-21, FCC 00-350 (2000); *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Schools & Libraries Universal Service Support Mechanism*, Order on

rules require USAC to "recover the full amount disbursed for any funding requests in which the beneficiary failed to comply with the Commission's competitive bidding requirements as set forth in section 54.504 and 54.511 of [FCC's] rules and amplified in related Commission orders."[14] Moreover, FCC rules require "that all funds disbursed should be recovered for any funding request in which the beneficiary failed to pay its non-discounted share."[15]

- SLD finds that both Saint Lukes School and Elite are responsible for these rule violations because Saint Lukes School was not able to conduct a fair and open competitive bidding process based on Elite's preparation and submission of Saint Lukes School's Funding Year 2002 FCC Form 470. FCC rules clearly prohibit service providers from preparing and submitting Form 470s on behalf of SLD applicants. FCC rules further require the entity that will negotiate with prospective bidders to be the one who completes the Form 470. The fact that Saint Lukes School and Elite may have complied with other FCC competitive bidding rules does not cure these violations.

For appeals that have been denied, partially approved, dismissed or canceled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street, S.W., Washington, D.C. 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We also thank you for your continued support, patience and cooperation during this appeal process.

Schools and Libraries Division
Universal Service Administrative Company

Reconsideration and Fourth Report & Order, CC Docket Nos. 96-45, 97-21, 02-6, 19 FCC Rcd 15252 (2004) ("*Schools & Libraries Fourth Report*").

[14] *Fifth Report and Order,* 19 FCC Rcd 15808, at ¶ 21.

[15] *Id.* at ¶ 24.

cc: Nora Flaherty
Saint Lukes School
608 East 139th Street
Bronx, NY 10454-2306

Jiin Kang
Elite System, Inc.
P.O. Box 1079
New York, NY 10113-1079

Phil Marchesiello, Esq.
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036